LINDETEVES-JACOBERG (MALAYA) SDN BHD

v.

ELECTRICAL SWITCHGEARS AUTOMATION (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[COMPANIES WINDING-UP NO: D2-28-828-1998]
14 APRIL 1999

BANKRUPTCY: *Petition - Withdrawal of petition - Application to be substituted as petitioner - Applicant had yet to issue statutory notice to respondent company - Companies Act 1965, s. 218(2)(a) - Whether applicant had a right to present petition - Companies (Winding-Up) Rules 1972, r. 33(1)*

WORDS & PHRASES: *"would have a right to present the petition" - Interpretation of "would have" - Companies (Winding-Up) Rules 1972, r. 33 - Whether a future qualification on right to present petition*

In this case, the petitioner company intended to withdraw the petition and one Cutler-Hammer Controls Sdn Bhd ('Cutler-Hammer') applied to be substituted in its place.

The issue before the court was whether Cutler-Hammer was a "person who … would have a right to present the petition" within r. 33(1) of the Companies (Winding-Up) Rules 1972 ('the Rules'). This was because Cutler-Hammer had yet to issue a statutory notice to the respondent company under s. 218(2)(a) of the Companies Act 1965 ('Act') and as such, the presumption under that section did not arise, namely, proof of the debtor company's inability to pay the debt concerned.

Cutler-Hammer urged the court to defer making an order on the intended withdrawal of the petition until it was in a position to show that the requirements of s. 218(2)(a) for the presumption to arise had been satisfied.

Held:

[1] Until the presumption under s. 218(2)(a) of the Act arises, ie, after the statutory notice has been issued and served and the debtor company has failed to satisfy the demand of the statutory notice within three weeks, an intending petitioner will have no cause of action to be qualified to present a petition. It follows that he will also have no cause of action to be qualified to be substituted as a petitioner under r. 33(1) of the Companies (Winding-Up) Rules 1972 ('Rules').

[2] When a petitioner expresses a desire to withdraw his petition, the respondent company is entitled, if not for a proposed substitution, to be freed of the petition. It will not be fair to the company to allow the petition to remain hanging over its head for the sake of enabling another party to qualify for substitution who is certain not to be qualified as of yet.

[3] The words "would have" in r. 33(1) of the Rules did not indicate a future qualification. The party seeking substitution qualified as a person who would have a right to present a petition if he had that right at the date when substitution was sought.

[Order on withdrawal.]

Case(s) referred to:
Perak Pioneer Ltd v. Petroliam Bhd [1986] 3 WLR 105 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(2)(a)
Companies (Winding-up) Rules 1972, r. 33(1)

For the petitioner - LH Saw; M/s Saw & Co
For the respondent - Namasivayam Ramesh; M/s Ramesh & Co
For the supporting creditor - LH Liew; M/s Shearn Delamore & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad J:

On 9 April 1999 the petitioner company expressed a wish to withdraw this petition, whereupon Cutler-Hammer Controls Sdn Bhd ("Cutler-Hammer") expressed their desire to be substituted as petitioner.

According to r. 33(1) of the Companies (Winding-up) Rules 1972, where a petitioner, among other things, "consents to withdraw his petition ... the court may upon such terms as it thinks just substitute as petitioner any person who, in the opinion of the court, would have a right to present the petition and who is desirous of proceeding with the petition".

The question that has arisen is whether Cutler-Hammer is a "person who ... would have a right to present the petition". It arose from the circumstances that on 9 April learned counsel for the respondent company informed the court that Cutler-Hammer had not yet issued against the respondent company a statutory notice under s. 218(2)(a) of the Companies Act 1965 and on 12 April

learned counsel for Cutler-Hammer confirmed that such was the case and that their petition would be dependent on the presumption under that section as to the inability of the respondent company to pay their debts. I had indicated that if substitution was to be ordered it would have to be on a written application, but that if, on the position as ascertained from the bar, Cutler-Hammer would not presently be qualified to be substituted, then I ought straight away to disregard their desire and proceed to give effect to the intended withdrawal of this petition unless some other party should desire substitution.

Learned counsel for Cutler-Hammer urged the court to defer making an order on the intended withdrawal of this petition until that company should be in a position to show that the requirements of s. 218(2)(a) for the presumption to arise have been satisfied. He said there had been instances of judges adopting such a course.

Where the case of an intending petitioner depends on the presumption under s. 218(2)(a) for proof of the debtor company's inability to pay its debts, the petitioner would have no case to bring until the presumption has arisen after the statutory notice has been issued and served and the company has, for three weeks, failed to satisfy the demand of the statutory notice. Until the presumption arises, the intending petitioner would have no cause of action to be qualified to present a petition. It must follow that he would have no cause of action to qualify to be substituted as a petitioner under r. 33(1). When a petitioner expresses a desire to withdraw his petition, the respondent company is entitled, were it not for a proposed substitution, to be freed of the petition, and it would not be fair to the company to allow the petition to remain hanging over its head for the sake of enabling another party to qualify for substitution who is known for certain to be not yet qualified.

The crucial words of r. 33(1) for present purposes are "any person who ... would have a right to present the petition" I wonder whether the definite article "the" is intentional or whether it should instead be "a petition", because if "the" is intentional, then "the petition" actually refers to the petition that is sought to be withdrawn and the interesting question would then arise as to when a person who intends to be a substitute petitioner can be said to have a right to present the petition that is sought to be withdrawn. The question, however, was not taken up in the brief submission, which did not pay regard to the point, it being, perhaps unconsciously, assumed that "a petition" was intended.

The only concern on my part, is, therefore, whether the words "would have", in relation to a right to present a petition, indicates a future qualification. If they are intended to indicate futurity, that would be the only justification for

learned counsel for Cutler-Hammer's urging that an order on the withdrawal be deferred until they qualified under s. 218(2)(a). In my opinion those words do not indicate futurity. Whether Cutler-Hammer would have the right to present a petition will have to be decided as of the moment.

Learned counsel for Cutler-Hammer cited the Privy Council's judgment in *Perak Pioneer Ltd v. Petroliam Bhd.* [1986] 3 WLR 105 at p. 112 C-G, where the Privy Council analysed r. 33 of the Companies (Winding-up) Rules of Hong Kong, which corresponds to our r. 33 although is not identical with it, and where, by the way, the thing that the intending substitute would have a right to present is expressed to be "a petition". The Privy council in that case were not concerned with the question whether substitution could be ordered where the party seeking substitution would not have a right to present a petition until sometime in the future but whether it could be ordered where the party seeking substitution was not a creditor when the existing petition was presented. The judgment, therefore, does not assist Cutler-Hammer. I do however, find some support there for what I have said about the words "would have". From the passage at p. 112 G, it may be understood that since the party seeking substitution had a right to present the petition at the date when substitution was sought, he qualified as a person who "would have a right to present a petition".

For the reason that I have given, I do not think I ought to defer making an order on the withdrawal of this petition to enable Cutler-Hammer to issue the statutory notice and qualify for the benefits of s. 218(2)(a).